Hon. Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

PORTIA JONES and SCOTT JONES, individually and on behalf of others similarly situated, Plaintiffs, vs. AUDIT & ADJUSTMENT COMPANY, INC. and KIMBERLEE WALKER OLSEN, Defendants.	No. 2:16-CV-00055-MJP DEFENDANT AUDIT & ADJUSTMENT COMPANY, INC.'S MOTION TO DISMISS PURSUANT TO RULE 12(B)(6) NOTED FOR HEARING: MARCH 18, 2016

I. INTRODUCTION

Pursuant to Fed.R.Civ.P. 12(b)(6), defendant Audit & Adjustment Company, Inc. ("Audit") moves to dismiss with prejudice Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief and Damages (the "Complaint"). (Dkt # 12).

In regard to Plaintiffs Consumer Protection Act ("CPA") claim, there is no allegation of any action taken by Audit upon which liability could be found. A client is not vicariously liable for the actions of an attorney for purposes of the state law claims, Audit is also protected by Washington's litigation privilege for purposes of the state law claims, and Plaintiffs' fail to support the *Hangman Ridge* test in their CPA claims against Audit.

Plaintiffs' claim under the Fair Debt Collection Practices Act ("FDCPA") also fails. Under King County Code, the District Court has a unitary countywide judicial district, and District Court General Administrative Order 13-10 ("GAO") required that all civil collection

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actions filed by Audit's attorney of record, Kimberlee Olsen, to be heard at a specific courthouse of the District Court. That court's GAO did not require Plaintiffs to travel outside the judicial district in which they resided, King County, and the difference in distance between where Plaintiffs reside and the courthouse specified is not great. The goal of the FDCPA, to prevent harassing practices by debt collectors, is not met in this case, and finding that Congress can control how the judicial branch administers its caseload violates the separation of powers.

Plaintiffs' civil conspiracy claim fails because: (1) the elements of conspiracy have not been met, and (2) the conspiracy claim fails when the substantive underlying claims fail.

II. FACTS

A. Audit requests judicial notice of sections of King County Code, King County District Court Local Rules, and the Court's Administrative Orders.

> In general, the Court may not consider any material outside the pleadings in ruling on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the complaint may be considered. *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir.1990) (citations omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading," may be considered in ruling on a Rule 12(b)(6) motion. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.1994). Also subject to consideration under Fed.R.Evid. 201 are matters of public record, of which the Court may take judicial notice. *Mack v. South Bay Beer Distrib*., 798 F.2d 1279, 1282 (9th Cir. 1986).

Phillips v. World Pub. Co., 822 F. Supp. 2d 1114, 1117-18 (W.D. Wash. 2011).

Pursuant to Fed. R. Evid. 201, Audit requests judicial notice of King County Code, local rules, GAOs, and the filed complaints in the collection cases alleged by Plaintiffs, which are attached to the Declaration of Marc Rosenberg Seeking Judicial Notice.

B. King County District Court is a "unified countywide district court, and GAO 13-10 directs where collection cases must be heard.

Audit requests this Court to take judicial notice of King County Code §§ 2.68.005 and 2.68.070, the relevant selections of which are attached as Exhibit 1.[1]

[1] The full text can be reviewed at http://www.kingcounty.gov/council/legislation/kc_code/05_Title_2.aspx.

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These code provisions provide as follows:

> **2.68.005 Purpose and intent.**
>
> A. The King County council finds that a unified, countywide district court, utilizing existing court facilities as satellites**,** while at the same time supporting the concept of local filing and handling of cases, would provide for a more equitable and cost-effective system of justice for the citizens of King County. It is the intent of council to establish such a unified district court system.

Ex. 1 at 1 [King County Code] (underline added).

> **2.68.070 King County district court ‑ organization.**
>
> A. There is created a single district court, whose boundaries are all the area within the boundaries of King County, including the centerline of Puget Sound and all of the current city of Bothell, as a joint district court district established under RCW 3.38.060 and named the district court of the state of Washington in and for the district of King County.

Id. at 2 (underline added).

The King County District Court Local Administrative Rules specify that the term "district" in RCW 3.66.040, under which claims are brought in the District Court, "shall refer to King County." LCRLJ 3.1 (attached as Exhibit 2).

Audit brought the collection action against Plaintiffs in King County District Court, Seattle Courthouse, cause no. 155-00817. (Dkt # 5 at ¶¶ 3.7-3.8). Plaintiffs live in Federal Way, Washington. (Dkt # 5 at ¶ 2.1). Audit requests judicial notice that Federal Way is located within King County, within the borders of the "unified county-wide district court."

The Rules also provide that:

> In order to assure the expeditious and efficient handling of all cases and an equitable distribution of workload among the Administrative Divisions, the Chief Presiding Judge, with the approval of the Executive Committee, may by written order, direct that certain types of cases be filed in different Administrative Divisions than otherwise provided in these rules for a designated period of time, or until further ordered.

LARLJ 0.18 (attached as Exhibit 3).

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Pursuant to these codes and rules, King County District Court has assigned specific types of cases to specific courthouses, both civil collection cases and otherwise. The website for King County District Court has put the court's General Administrative Orders ("GOA") online.[2] The publicly available records of the District Court reflect that it has had a GAO related to the filing of civil collection cases for over 20 years, and that the Court has been conscientious about designating specific courthouses within its judicial district to hear civil collection cases. *See* Ex. 4 [GAO 95-39]; Ex. 5 [GAO 96-46]; Ex. 6 [GAO 97-57]; Ex. 7 [GAO 99-71]; Ex. 8 [GAO 02-82]; Ex. 9 [GAO 02-86]; Ex. 10 [GAO 02-87]; Ex. 11 [GAO 03-91]; Ex. 12 [GAO 09-126]; Ex. 13 [GAO 13-02]; Ex. 14 [GAO 13-08]; and most recently Ex. 15 [GAO 13-10].

GAO 13-10 was signed on October 25, 2013, and was the effective Order of the District Court at the time of the events alleged in the Complaint. Ex. 15. GAO 13-10 states: "In order to promote prompt and efficient customer service the Court has deemed it necessary to pre-assign certain civil collection cases to specific locations." Ex. 1 at 1. "Unless otherwise ordered by the court, the following civil collection cases shall be heard at the Seattle Courthouse, Western Division, King County District Court: All civil collection cases filed by Kimberlee Olsen … on behalf of their clients." *Id.* As such, a court order specifically directed that cases filed by Kimberlee Olsen must be heard at Seattle Courthouse, Western Division. This Court must give full faith and credit to the District Court's Orders. 28 U.S.C. § 1738.

This administrative designation of court resources to the appropriate courthouse is not limited to civil collection cases. So, for example, at one point, the District Court directed all University of Washington Police cases all had to be filed in Shoreline. Ex. 16 [GAO 95-42]. Likewise, by GAO. The District Court has designated the courthouse in which specific types of

[2] The website is located at http://www.kingcounty.gov/courts/district-court/about/GAO.aspx

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infraction cases, criminal cases, and environmental protection matters were to be heard. Ex. 17 [GAO 2005-108]; Ex. 18 [GAO 07-118]; Ex. 19 [GAO 15-03].

It is unnecessary to present all of the King County District Court's GAO's here, but these several GAOs reflect that the King County District Court uses these GAOs to organize its cases in the manner in which it believes it can most effectively administer its caseload. The important point is that Ms. Olsen filed this civil collection case in the courthouse in which the District Court ordered it to be heard in GAO 13-10. Ex. 15.

III. POINTS AND AUTHORITIES

A. Standard on Rule 12(b)(6).

> A motion to dismiss under Rule 12(b)(6) may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir.1988). Material allegations are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir.1983). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (internal citations omitted).

Robertson v. GMAC Mortgage LLC, 982 F. Supp. 2d 1202, 1206 (W.D. Wash. 2013).

> A claim has "facial plausibility" when the party seeking relief "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* … The Court is not, however, bound to accept the plaintiff's conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper motion.

Bldg. 11 Investors LLC v. City of Seattle, 912 F. Supp. 2d 972, 978 (W.D. Wash. 2012) (citing *Vasquez v. L.A. County*, 487 F.3d 1246, 1249 (9th Cir.2007); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.2001)).

In other words, the Court must determine whether the non-conclusory factual content, and reasonable inferences from that content are plausibly suggestive of a claim entitling the

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plaintiff to relief. *In re Hawaiian & Guamanian Cabotage Antitrust Litig*., 754 F. Supp. 2d 1239, 1245 (W.D. Wash. 2010).

B. Plaintiffs FDCPA claim is based on 15 U.S.C. § 1692i(a)(2), which fails because the underlying civil collection action was filed within the borders of the District Court's unified countywide court.

Plaintiffs allege that Audit violated § 1692i by bringing a civil collection case against them in the courthouse specified in GAO 13-10, which was within the borders of the "unified countywide district court." (Dkt 12 at 4). Plaintiffs allege this is so because there are several courthouses within the unified countywide District Court, and they allege there is a courthouse closer to where Plaintiff's claim to reside. Plaintiffs did not allege that this closer courthouse permits any hearings within it, let alone that it hears collection cases.

Section 1692i states:

> Any debt collector who brings any legal action on a debt against any consumer shall —
>
> …
>
> bring such action only in the judicial district or similar legal entity —
>
> (A) in which such consumer signed the contract sued upon; or (B) in which such consumer resides at the commencement of the action.

15 U.S.C. § 1692i(a)(2).

The FDCPA does not define the term "judicial district or similar legal entity," but, as shown below, the term "judicial district or similar legal entity" is generally understood to be a "county," and the civil collection case at issue was brought within the borders of the "unified countywide District Court". In addition, the collection case here was heard in the courthouse in which GAO 13-10 ordered it to be heard, and permitting Congress to direct how a court administers its cases violates the separation of powers doctrine, and finding liability here would not further the goals of the FDCPA.

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C. The "judicial district" is the county in which Plaintiffs live, King County.

1. The civil collection case at issue was brought against Plaintiff within the borders of King County, which is where they live.

Under King County Code §§ 2.68.005 and 2.68.070, King County District Court is unified countywide district, with the borders being all of King County. The vast majority of courts in the United States addressing the issue, including the Ninth Circuit, have understood "judicial district," in § 1692i(a)(2) to equate to a county.

In *Fox v. Citicorp Credit Services, Inc*., 15 F.3d 1507 (9th Cir.1994), the Ninth Circuit looked at Arizona's state court system in construing the venue requirement of § 1692i. Citicorp persisted in filing collection actions against the Foxes in a neighboring county, although the Foxes twice successfully moved to have the suits transferred to the county where they lived. *Id*. at 1510. Finally, the Foxes sued Citicorp for violating § 1692i. The Ninth Circuit concluded that a debt collector must file in the debtor's home county, rather than in a neighboring county that was part of a larger multi-county judicial district. *Id*. at 1511. The holding in Fox accepts that the phrase a "judicial district or similar legal entity" is understood to be a county.

It is worth noting that *Fox* took place in Arizona, and defendants there argued that Arizona constituted a single federal judicial district and a single superior court system, and so argued they could bring the action anywhere in the state, because the state was one big judicial district. *Fox*, 15 F.3d at 1515. This proposition has been rejected by many courts. Arizona counties are divided into "justice precincts" that contains "Justice Courts," Ariz. Rev. Stat. § 22-101, and each incorporated city or town must have a "Municipal Court." *Id.*, § 22-402. These inferior courts have transfer of venue provisions, *see e.g., Id.*, §§ 22-204, 22-505, just like the superior courts. *Id.*, § 12-403. Had *Fox* wished to hold that a collection action must be brought in the smallest possible unit available, the Ninth Circuit would have identified inferior courts of Arizona as the relevant judicial district in which the action needed to be filed. Instead, *Fox* held that the relevant judicial district within the state was the county.

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Dutton v. Wolhar, 809 F. Supp. 1130 (D. Del. 1992), is also on point. The *Dutton* court instructed that "Congress indicated the purpose of § 1692i is to prevent debt collectors from bringing collection suits in forums located at **great distances** from debtors' residences. *Id.* at 1139 (citing S.Rep. No. 382, 95th Cong. 1st Sess. 5 reprinted in 1977 U.S.Code Cong. & Admin.News 1695, 1699) (emphasis added).

> … the term "judicial district or similar legal entity" in § 1692i appears to provide that when such action is one to collect a debt, **institution of suit is limited to the county in which the alleged debtor resides or signed the contract forming the basis of the de**bt.
>
> This is consistent with the legislative history of the Act. Senate Report 382 provides that by enacting § 1692i Congress intended to adopt the "fair venue standards" developed by the Federal Trade Commission. S.Rep. No. 382, 95th Cong. 1st Sess. 5 reprinted in 1977 U.S.Code Cong. & Admin.News 1699. Those standards permit a debt collector to sue on a debt only in the county in which the alleged debtor resides or signed the contract upon which the suit is premised. *In re New Rapids Carpet Center, Inc.*, 90 F.T.C. 64 (1977); FTC Informal Staff Letter to Schwulst, September 12, 1988.

Dutton, 809 F. Supp. at 1139 (emphasis added).

Many other federal and state courts have recognized that a county is the unit that should be used when determining the proper judicial district. *See e.g., Frazier v. Matrix Acquisitions, LLC*, 873 F. Supp. 2d 897, 907 (N.D. Ohio 2012) ("[u]nder the terms of the statute, suit could have been brought against Frazier in the judicial district (here, county) (1) where she signed the credit card contract or (2) where she resided at the time the underlying action was commenced"); *In re Lord*, 270 B.R. 787, 797 (Bankr. M.D. Ga. 1998) ("[t]he Court is persuaded that the phrase 'judicial district or similar legal entity' means 'county.'"); *Wiener v. Bloomfield*, 901 F. Supp. 771, 775-76 (S.D.N.Y. 1995) ("[f]or purposes of the Act, 'judicial district,' although not defined, has been held to mean 'county' when determining whether a state court action has been filed in the proper judicial district"); *Narwick v. Wexler*, 901 F. Supp. 1275, 1280 (N.D. Ill. 1995) (there was no venue violation in suit brought against first consumer, who resided in one municipal district of Cook County, and who was sued in another

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municipal district in that county); *Martinez v. Albuquerque Collection Servs., Inc.*, 867 F. Supp. 1495, 1502 (D.N.M. 1994) ("the proper forum for a collection suit against Plaintiff would have been where she resided, Santa Fe County"); *Rutgers-The State Univ. v. Fogel*, 403 N.J. Super. 389, 400, 958 A.2d 1014, 1021 (App. Div. 2008) ("we conclude that the basic 'judicial district' within the meaning of section 1692i is the county"); *Flores v. Quick Collect, Inc.*, 2007 WL 2769003, at *3 (D. Or. Sept. 18, 2007) (recognizing "judicial district" to mean "county"); *Hester v. Graham, Bright & Smith*, 2005 WL 994704, at *3 (E.D. Tex. Apr. 1, 2005) ("[t]he undersigned is unaware of any case finding that the term "judicial district or similar legal entity," as used in the FDCPA means anything other than the applicable county court").

While there are a couple of cases to the contrary scattered around the county that are contrary to the general rule, not only do the majority of courts hold that the term "judicial district," in § 1692i(a)(2) equates to a county, but such cases are much better reasoned, and draw from the legislative history of the FDCPA and the intent of the Federal Trade Commission. Not only that but King County District Court, by King County Code, is not separated into a separate judicial district for each Court House. Rather, the King County Code has created a "unified countywide district court." King County Code § 2.68.005.

Here, Plaintiffs live in King County and the collection case was brought within the borders of King County. Therefore, there was no violation of the FDCPA.

2. Plaintiff will rely on *Suez*, which is a distinguishable foreign plurality opinion that departed from stare decisis and should not be adopted here.

Plaintiffs will rely on *Suesz v. Med-1 Solutions, LLC*, 757 F.3d 636 (7th Cir. 2014) *cert. denied*, 135 S. Ct. 756, 190 L. Ed. 2d 628 (2014), a plurality opinion in which two judges were joined by one concurrence for the result, and with two separate dissents. Even higher court opinions may not be binding when they are pluralities. *See e.g., United States v. Brobst*, 558 F.3d 982, 991 (9th Cir. 2009) (citing *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69,

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81, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987)). Certainly, a sharply divided circuit court in another jurisdiction is not binding here, and this is one case where the dissents bear close review.

Unlike the better reasoned cases cited by Audit, *Suesz* does not consider the FTC or legislative intent. In fact, one looking at *Suesz* is struck by the lack of citation to precedent; and *Suesz* recognizes it is creating new law when it calls what it is doing the "venue approach," *id*. at 647, and discusses whether its new rule should be applied retroactively. *Id*. at 649. And even though *Suesz* found the term "judicial district" to be "vague," 757 F.3d at 639, it expressly rejected the common understanding as provided in the dictionary in overturning its own prior precedent. *Id*. at 643. *Suesz* also claims that the FDCPA "does not tell states how to organize or operate their court systems." *Id*. at 648. But that is precisely what it is doing in this case, which also makes it distinguishable. It is also of note that, despite being published for a year and a half, there is no published case within or without the Seventh Circuit that has adopted this *Suesz* holding. Rather than simplify application of the law, it confuses issues and makes analysis unpredictable. In short, *Suesz* is not good new law for this circuit to adopt.

It should also be noted that, while *Suesz* discusses "change of venue," there is a difference between "change of venue" and "transfer" of a case. In King County District Court, judges may transfer the case from one courthouse to another. *See* LARLJ 0.18(b) ("Any judge may direct the transfer of a pending case to another Administrative Division for good cause, upon the court's own motion or upon the motion of any party"). While cases may be "transferred" or "reassigned" within a single court (e.g. a change from one judge to another), this is not the same as "change of venue" between courts of different jurisdiction (e.g. a change between Eastern District and Western District of Washington). Cases may be reassigned among the different courthouses within King County District Court, and the cases do not receive a new cause number in the transfer, but this reassignment is not the same as a change of

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venue. Taken to its logical conclusion, under Plaintiffs' theory, an assignment to a judge could trigger the FDCPA, depending upon which judge's courtroom is closer to Plaintiffs' house.

D. It would violate the separation of powers doctrine to read the FDCPA as controlling how a court administers is case docket, and the preemption doctrine does not apply to controlling administrative functions of a court.

A finding that Audit is liable under the FDCPA would be a finding that the King County District Court does not have the authority to determine how best to control and administer its case docket; and this would present separation of powers problems.

The separation of powers doctrine prohibits Congress from encroaching upon the powers conferred to the judiciary. *United States v. Kennedy*, 593 F. Supp. 2d 1221, 1231 (W.D. Wash. 2008) (citing *Kilbourn v. Thompson*, 103 U.S. 168, 191, 26 L.Ed. 377 (1880)). The Supreme Court has guarded the separation of powers doctrine by condemning any enactment that "impermissibly threatens the institutional integrity of the Judicial Branch." *Id.* (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986)).

In *Landis v. N. Am. Co.*, 299 U.S. 248, 57 S. Ct. 163, 81 L. Ed. 153 (1936), the United States Supreme Court recognized:

> … the power inherent in **every court** to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

Id. at 254-55 (emphasis added). *See also Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796, 107 S. Ct. 2124, 2132, 95 L. Ed. 2d 740 (1987) (a court's ability to enforce its own rules is essential to the judicial power of the court); *United States v. W.R. Grace*, 526 F.3d 499, 509 (9th Cir. 2008).

In issuing GAO 13-10, King County District Court was exercising its inherent authority to control its own caseload in the most efficient manner. Therefore, a statute by the Legislature

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that commands it as to how to best control the disposition of the causes on its docket infringes on its exercise of judgment and violates the separation of powers doctrine.

In *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225-26, 115 S. Ct. 1447, 1456, 131 L. Ed. 2d 328 (1995), the Supreme Court held that Securities Exchange Act section § 27A(b), providing that certain suits, which would have been untimely under laws existing on that date, could be reinstated upon motion made within 60 days, violated constitutional separation of powers principles by instructing federal courts to reopen final judgments.

In *Waples v. Yi*, 169 Wn.2d 152, 158, 234 P.3d 187, 190 (2010), the Washington State Supreme Court held that a statute requiring medical malpractice plaintiffs to provide defendants with 90 days written notice of claim prior to filing suit violated separation of powers by conflicting with the judiciary's power to set court procedures.

Here, King County District Court GAO 13-10 required the civil collection case at issue to be heard at a specific Court House in its unified countywide district. Ex. 1; King County Code § 2.68.005. This Order did not require Plaintiffs to travel outside of King County, the county in which they reside.

Audit followed GAO 13-10, and now Plaintiffs are suing Audit because its attorney followed a Court Order. Finding that Congress can make a law that controls how a County defines its courts and how the judicial branch administers its case load violates the separation of powers doctrine by depriving the court of its ability to properly administer its case load. Of course, the need to reach this finding can be avoided simply by recognizing that the phrase "judicial district" refers to a county, in which case Audit complied with the law.

E. Finding liability here would not further the goals of the FDCPA.

"Congress indicated the purpose of § 1692i is to prevent debt collectors from bringing collection suits in forums located at **great distances** from debtors' residences. *Dutton*, 809 F. Supp. at 1139 (citing S.Rep. No. 382, 95th Cong. 1st Sess. 5 reprinted in 1977 U.S.Code Cong.

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& Admin.News 1695, 1699) (emphasis added). *See also Harper v. Collection Bureau of Walla Walla, Inc.*, No. C06-1605-JCC, 2007 WL 4287293, at *8 (W.D. Wash. Dec. 4, 2007) (same).

> The purposes of the FDCPA are "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). Congress passed the Act in light of the "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." *Id.* § 1692(a). It found that these practices "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." Id.

Wade v. Reg'l Credit Ass'n, 87 F.3d 1098 (9th Cir. 1996).

This case does not present the type of abusive or deceptive conduct for which the FDCPA was enacted. The Court may take judicial notice that Federal way is only about 20 miles from the courthouse at issue, and the distance can be traveled in under an hour.

In fact, this Court should consider the pertinent opinion in *Bailey v. Security Nat'l Servicing Corp*., 154 F.3d 384 (7th Cir. 1998), in making its decision in this case.

> Congress allowed for class actions under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(2)(B). No doubt some flagrant abuses by debt collectors are held in check by the collective effort of those who are abused. But the law can be abused just as easily by attorneys who use debtors to allege and test the most minute violations of a concededly intricate statutory scheme. … Class actions can benefit plaintiffs by getting a lawyer interested in taking on what individually comes close to a small claims case (no more than $ 1000 for each transgression, see 15 U.S.C. § 1692k(a)(2)(A)), but litigation is costly to all concerned and uses judicial resources as well. The law would be best served by challenging clear violations rather than scanning for technical missteps that bring minimal relief to the individual debtor but a possible windfall for the attorney.

Bailey, 154 F.3d at 388.

Audit is being sued solely because its attorney, Kimberlee Olsen, brought a collection case against the Plaintiffs where the District Court ordered her to bring this cases. The difference in distance between where Plaintiffs reside and the Seattle courthouse is not great, and was brought within the borders of the county in which they reside. The goal of the FDCPA, to prevent harassing practices by debt collectors, is not met in this case.

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F. This Court should be aware of two pending related actions, and may want to consider staying this case until the issue in those cases have been decided.

This Court should be aware that there are currently two lawsuits currently pending in this court that alleges the same the theory of liability under the FDCPA, but as to different defendants. Those cases are as follows:

1. *Mosby v. Merchants Credit*, Western District case no. 2:15-cv-01196-RSL. In *Mosby*, Judge Lasnik has set oral argument to occur on February 22, 2016. Judge Lasnik is aware of the *Linehan* case, but will be making his own determination on the additional issues that have been placed before him. *See* Case No. 2:15-cv-01196-RSL, (Dkt 75).

2. *Linehan v. AllianceOne Receivables*, Western District case no. 15-cv-1012-JCC. In *Linehan*, Judge Coughenour, based on the defense attorney's failure to provide adequate information and authority, denied a Rule 12(b)(6) motion brought by defendants. The defendants have moved to certify the issue to the Ninth Circuit, and that order has not been ruled on yet. An unpublished district court decision has no precedential authority. *United States v. Heuer*, 916 F.2d 1457, 1460 (9th Cir. 1990) (citing *Prestin v. Mobil Oil Corp.*, 741 F.2d 268, 270 n3 (9th Cir.1984) (rejecting "as authority an unpublished disposition by a district judge")). *See also* Ninth Circuit Rule 36–3(a) and (b); *Phelps v. Alameida*, 569 F.3d 1120, 1136 (9th Cir. 2009); *Reynolds Metals Co. v. Ellis*, 202 F.3d 1246, 1249 (9th Cir. 2000); *Ellett v. Stanislaus*, 506 F.3d 774, 780 (9th Cir. 2007). Thus, *Linehan* is not binding on this Court.

Some differences between this case and *Mosby* on the one hand, and *Linehan* on the other hand are that in *Lineham* Judge Coughenour was not made aware of the following issues.

1. King County Code §§ 2.68.005 and 2.68.070, which describes King County District Court as a "unified, countywide district court," and specifies that "[t]here is created a single district court, whose boundaries are all the area within the boundaries of King County." This is a significant point because it reflects that King County District Court recognizes itself

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as a single countywide entity whose borders are all of King County, and this authority has been presented to the Court here for consideration, though it was not before Judge Coughenour.

2. In *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507 (9th Cir.1994), where the Ninth Circuit held the judicial was a county, the Arizona system also contained the smaller "justice precincts," but that these were not determined to be the relevant "judicial district."

3. *Dutton v. Wolhar*, 809 F. Supp. 1130 (D. Del. 1992), which discusses how the definition of "judicial district" is consistent with the legislative history of the FDCPA. However, this authority has been presented to the Court here for consideration.

4. Senate Report 382, which provides that by enacting § 1692i Congress intended to adopt the "fair venue standards" developed by the Federal Trade Commission. S.Rep. No. 382, 95th Cong. 1st Sess. 5 reprinted in 1977 U.S.Code Cong. & Admin.News 1699; and that those standards permit a debt collector to sue on a debt only in "the county" in which the alleged debtor resides or signed the contract upon which the suit is premised. *In re New Rapids Carpet Center, Inc.*, 90 F.T.C. 64 (1977); FTC Informal Staff Letter to Schwulst, September 12, 1988. This authority has been presented to this Court here for consideration.

5. The copious authority from other courts, which shows that many other courts have recognized that a county is the unit that should be used when determining the proper judicial district. *See e.g., Frazier v. Matrix Acquisitions, LLC*, 873 F. Supp. 2d 897, 907 (N.D. Ohio 2012) ("[u]nder the terms of the statute, suit could have been brought against Frazier in the judicial district (here, county) (1) where she signed the credit card contract or (2) where she resided at the time the underlying action was commenced"); *In re Lord*, 270 B.R. 787, 797 (Bankr. M.D. Ga. 1998) ("[t]he Court is persuaded that the phrase 'judicial district or similar legal entity' means 'county.'"); *Wiener v. Bloomfield*, 901 F. Supp. 771, 775-76 (S.D.N.Y. 1995) ("[f]or purposes of the Act, 'judicial district,' although not defined, has been held to mean 'county' when determining whether a state court action has been filed in the proper

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judicial district"); *Narwick v. Wexler*, 901 F. Supp. 1275, 1280 (N.D. Ill. 1995) (there was no venue violation in suit brought against first consumer, who resided in one municipal district of Cook County, and who was sued in another municipal district in that county); *Martinez v. Albuquerque Collection Servs., Inc.*, 867 F. Supp. 1495, 1502 (D.N.M. 1994) ("the proper forum for a collection suit against Plaintiff would have been where she resided, Santa Fe County"); *Rutgers-The State Univ. v. Fogel*, 403 N.J. Super. 389, 400, 958 A.2d 1014, 1021 (App. Div. 2008) ("we conclude that the basic 'judicial district' within the meaning of section 1692i is the county"). This authority has been presented to this Court here for consideration.

6. The Separation of Powers argument. Here, this Court has been presented with a Separation of Powers issue to determine.

7. That *Suesz v. Med-1 Solutions, LLC*, 757 F.3d 636 (7th Cir. 2014) *cert. denied*, 135 S. Ct. 756, 190 L. Ed. 2d 628 (2014), is a plurality opinion in which two judges were joined by one concurrence for the result, and with two separate dissents that should be seriously considered. Here, this Court has been presented with this argument to determine.

8. That *Suesz* claims that the FDCPA "does not tell states how to organize or operate their court systems," but that this is precisely what it is doing in this case, which also makes it distinguishable. Here, this Court has been presented with this argument to determine.

9. Unlike the better reasoned cases cited by Audit, *Suesz* does not consider the FTC or legislative intent and rejects prior settled law, and recognizes it is creating new law when it calls what it is doing the "venue approach.". Here, this Court has been presented with this argument to determine.

This Court is faced with different facts and legal issues that were not placed before Judge Coughenour, and which Judge Cougehour presumably did not consider in his ruling. Neither *Lineham* nor *Suesz* is binding authority, and this Court should consider all of the issues presented in this case and come to its own conclusion.

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G. Plaintiffs' state law claim under the CPA fails for a variety of reasons.

1. The state law CPA claim fails because, under Washington law, a client is not vicariously liable for the acts of its attorney.

In Washington, attorneys are considered to be independent contractors upon which vicarious liability will not lie as to the client. *See e.g.*, *Evans v. Steinberg*, 40 Wn. App. 585, 588, 699 P.2d 797, 798-99 (1985) ("Continental is not liable for the acts of the defense attorneys who were acting as independent contractors"); *Fite v. Lee*, 11 Wn. App. 21, 521 P.2d 964 (1974) (spouse in a dissolution action not liable for writs of garnishment improperly issued by her attorney); *Demopolis v. Peoples Nat. Bank of Washington*, 59 Wn. App. 105, 117, 796 P.2d 426, 433 (1990) (applying *Evans* and *Fite* to defamation claim). Likewise, in *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 159 P.3d 10 (2007), the Court of Appeals reversed the trial court and held that a creditor client is not vicariously liable for the actions of its debt collector. *See also Routt v. Amazon.com, Inc.*, C-12-1307-JLR, 2012 WL 5993516 at *2 (W.D. Wash. Nov. 30, 2012) (dismissing claim under Rule 12(b)(6) where complaint lacked allegation that company had the right to control the manner in which Associates conducted itself).

Plaintiffs do not alleged that Audit itself engaged in any unfair or deceptive acts or practices, only that its attorney filed a lawsuit in the wrong courthouse. While Audit denies that Ms. Olsen did anything wrong, Audit is not liable even if its attorney did file a lawsuit in an incorrect courthouse. There is no allegation that Audit did anything wrong, and no allegation that Audit controlled the manner in which Ms. Olsen filed her cases, so there is simply no basis for a claim of vicarious liability against Audit on the CPA claim.

2. The state law Consumer Protection Act claim fails because, under Washington's litigation privilege.

Parties in judicial proceedings are absolutely immune from suit founded on their allegations. *Wynn v. Earin*, 163 Wn.2d 361, 369-70, 181 P.3d 806 (2008); *Deatherage v. State, Examining Bd. of Psychology*, 134 Wn.2d 131, 135, 948 P.2d 828, 830 (1997); *Gustafson v.*

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Mazer, 113 Wn. App. 770, 775, 54 P.3d 743 (2002). Absolute privilege applies to statements made in judicial proceedings and bars civil liability. *Deatherage*, 134 Wn.2d at 135. Litigation privilege applied to claims such as defamation, malicious prosecution, conspiracy to interfere with contract, conspiracy to intentionally inflict emotional distress, negligence, false imprisonment, and other such claims. *See Bruce v. Byrne-Stevens & Associates Engineers, Inc.*, 113 Wn.2d 123, 132, 776 P.2d 666, 671 (1989). The immunity of parties extends not only to their testimony, but also to acts and communications which occur in connection with the preparation of that testimony. *Id*. "In other words, '[a]ll witnesses are immune from all claims arising out of all testimony.'" *Gustafson*, 113 Wn. App. at 775. In regard to the CPA claim, Plaintiffs do not make any allegation against Audit, other than that it was a party to a lawsuit and retained an attorney for this purpose.

Some of Plaintiffs allegations do not relate to litigation, such as the communications with the court regarding administrative matters. However, to the extent that this lawsuit is based on the filing of documents with a court, the litigation privilege protects Audit as to all state law claims where it did not take any action on its own other than protect its rights in court.

3. Plaintiffs' fail to support the elements of the *Hangman Ridge* test.

> The CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. A private cause of action exists under the CPA if (1) the conduct is unfair or deceptive, (2) occurs in trade or commerce, (3) affects the public interest, and (4) causes injury (5) to plaintiff's business or property.

Robertson, 982 F. Supp. 2d at 1209 (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986)).

"Since private CPA plaintiffs must establish all five elements, the finding that [any] element is not met is fatal to plaintiffs' claim." *Hangman Ridge*, 105 Wn.2d at 793. Here, Plaintiffs' CPA claim against Audit must be dismissed where they fail to support each element of a CPA claim.

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a. There is no allegation that Audit engaged in any unfair or deceptive act or practice.

The first element of a CPA claim is an unfair or deceptive practice. *Hangman Ridge*, 105 Wn.2d at 780. "Whether an act is unfair or deceptive is a question of law." *Robertson*, 982 F. Supp. 2d at 1209 (citing *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997)). "Acts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law." *Leingang*, 131 Wn.2d at 155, 930 P.2d at 299; *Perry v. Island Savings & Loan Ass'n*, 101 Wn.2d 795, 810, 684 P.2d 1281 (1984). Acts or practices which are reasonable business practices or which are not injurious to the public are not the kind of acts sought to be prohibited. RCW 19.86.920; *Money Savers Pharmacy, Inc. v. Koffler Stores (W.) Ltd*., 37 Wn. App. 602, 611, 682 P.2d 960, 965 (1984). By expressly allowing for reasonable business practices, our Legislature recognized that a court must weigh the public interest in prohibiting anticompetitive conduct against the recognition that businesses need some latitude within which to conduct their trade. *State v. Black*, 100 Wash. 2d 793, 803, 676 P.2d 963, 969 (1984).

The only thing Audit did was retain an attorney to collect on the debt that Plaintiffs had defaulted on. There is nothing unfair or deceptive about that. Even if Audit could be held vicariously liable for the independent acts of its attorney, which it cannot, the case was filed in accordance with a court order, GAO 13-10, and therefore the filing was done in good faith and under a reasonable interpretation of the law. The CPA claim against Audit should be dismissed where there is no allegation that Audit itself engaged in any action that was unfair or deceptive.

b. While reserving the right to dispute the "trade or commerce" aspect of this claim, Audit will not do so here for purposes of this motion to dismiss.

The second element of the *Hangman Ridge* test requires the act in question to occur in "trade or commerce." *Hangman Ridge*, 105 Wn.2d at 780. "[A] court proceeding does not constitute 'trade or commerce' under the CPA." *Medialdea v. Law Office of Evan L. Loeffler*

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PLLC, No. C09-55RSL, 2009 WL 1767185, at *8 (W.D. Wash. June 19, 2009) (holding that attorney's alleged misrepresentation before a court as to the amount of attorney's fees due to him was not made in the conduct of trade or commerce). Plaintiffs allege that "Defendants filed that lawsuit in King County District Court, West Division, Seattle, under Cause No. 155-00817." (Dkt 1 at ¶ 3.6). Here, Plaintiffs' allegations relate strictly to actions taken in a court proceeding. As such, they fail to meet the second element of the *Hangman Ridge* test.

c. There is no showing that any action taken by Audit affected the public interest

The third element of the test is that of a public interest showing. *Hangman Ridge*, 105 Wn.2d at 787. "[T]he Legislature intended that even a private plaintiff should be required to show that the acts complained of affect the public interest." *Id*. at 788. The purpose of the CPA is to "complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition." RCW 19.86.920. Again, the only thing Audit did was retain an attorney to file a lawsuit. There is no allegation that there was not a legitimate basis for the lawsuit itself. The fact that Audit retained an attorney to recover damages for the money it was owed is not, in and of itself, anything that affects the public interest.

d. Plaintiffs did not allege damage to their business or property.

"The fourth element of a private CPA action requires a showing that plaintiff was injured in his or her 'business or property'." *Hangman Ridge*, 105 Wn.2d at 792 (citing RCW 19.86.090). "The CPA specifically requires the Plaintiff plead an actual injury—whether monetary or some other non-quantifiable injury." *Paris v. Steinberg & Steinberg*, 828 F. Supp. 2d 1212, 1217-18 (W.D. Wash. 2011) (citing *Hangman Ridge*, 105 Wn.2d at 780, 719 P.2d 531). This is so even where a Plaintiff asserts the right to injunctive or declaratory relief. *Id*. "The CPA does not authorize a remedy for a person who fails to plead actual damages." *Id*. at

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1218 (citing *Girard v. Myers*, 39 Wn. App. 577, 589, 694 P.2d 678 (1985)). As such, Plaintiffs fail to support a claim under the CPA.

e. There is no causal link between conduct and damages.

The fifth element is that of causation. … A causal link is required between the unfair or deceptive acts and the injury suffered by plaintiff." *Hangman Ridge*, 105 Wn.2d at 792-793. To show causation, Plaintiffs must establish that, but for Audit's actions, they would not have suffered an injury. *Robertson*, 982 F. Supp. 2d at 1209 (citing *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 84, 170 P.3d 10 (2007)). Plaintiffs do not allege any action taken by Audit that caused any injury to Plaintiffs. As such, Plaintiffs' CPA claim fails on the proximate cause element as well.

H. Plaintiffs' civil conspiracy claim fails.

Plaintiffs finally allege a civil conspiracy. (Dkt 12 at 13).

> Under Washington law, a civil conspiracy claim requires "clear, cogent, and convincing evidence" that two or more people entered into an agreement to accomplish an unlawful purpose or to accomplish a lawful purpose via unlawful means. Alleging mere suspicion or commonality of interests is insufficient. If the factual allegations are equally consistent with a lawful or honest purpose as with an unlawful purpose, the allegations are insufficient to support a claim of civil conspiracy.

Robinson v. Pierce Cty., 539 F. Supp. 2d 1316, 1333 (W.D. Wash. 2008) (citations omitted). *See also Swartz v. KPMG, LLC*, 401 F. Supp. 2d 1146, 1157 (W.D. Wash. 2004) *aff'd in part, rev'd in part sub nom*. *Swartz v. KPMG LLP*, 476 F.3d 756 (9th Cir. 2007).

"A conspiracy claim fails if the underlying act or claim is not actionable." *Nw. Laborers-Employers Health & Sec. Trust Fund v. Philip Morris, Inc.*, 58 F. Supp. 2d 1211, 1216 (W.D. Wash. 1999). *See also Oregon Laborers Employers Health & Welfare Trust Fund v. Philip Morris*, 185 F.3d 957, 969 (9th Cir. 1999) ("claim for civil conspiracy is entirely dependent on underlying" substantive claims; where "the underlying claims fail, [the] civil conspiracy claim must also fail").

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Plaintiffs' claims fail because: (a) Plaintiffs have not pled with the required specificity, (b) Plaintiffs have not shown that "conspiring" to file District Court lawsuits within the unified, countywide borders of the District Court is unlawful, and (c) Plaintiffs have not shown that Audit accomplished its lawful purpose by any unlawful means.

Finally, Plaintiffs' civil conspiracy claim fails where the underlying FDCPA and CPA claims are not actionable.

IV. CONCLUSION

Audit requests that this Court dismiss Plaintiffs' claims against it and dismiss it as a party from the lawsuit for all purposes.

For purposes of the state law CPA claim, Audit is not vicariously liable for actions alleged against its attorney, and is immune under Washington's litigation privilege. Even if considered on the merits, Plaintiffs' CPA claim fails where they do not support any of the required elements of the *Hangman Ridge* test.

For purposes of the sole FDCPA claim, alleged under 15 U.S.C. § 1692i(a)(2), the civil collection action filed against Plaintiffs was filed within the "unified countywide District Court" in King County, which is the "judicial district" in which they lived. In addition, permitting Congress to legislate how the King County District Court administers its case docket violates the separation of powers doctrine; and finding liability here does not further the goals of the FDCPA.

For purposes of the civil conspiracy claim: (a) Plaintiffs have not pled with the required specificity, (b) Plaintiffs have not shown that "conspiring" to file District Court lawsuits within the unified, countywide borders of the District Court was unlawful, and (c) Plaintiffs have not shown that Audit accomplished its lawful purpose by any unlawful means.

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DATED this 22nd day of February, 2016.

LEE SMART, P.S., INC.

By: /s Marc Rosenberg
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CERTIFICATE OF SERVICE

I hereby certify that on the date provided at the signature below, I electronically filed the preceding document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following individuals:

Antoinette M. Davis	tonie@toniedavislaw.com
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Guy W. Beckett	gbeckett@beckettlaw.com

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, to the best of my knowledge.

Dated this 22nd day of February, 2016 at Seattle, Washington.

LEE SMART, P.S., INC.

By: /s Marc Rosenberg ______________

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